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No. 04-5928

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The International Court of Justice ruled in *Avena* that Texas' failure to advise Petitioner of his right to consular services resulted in a violation of both Mexico's and Petitioner's rights under the Vienna Convention on Consular Relations, and that application of the procedural default doctrine to deny a United States court the ability to reconsider Petitioner's conviction and sentence in light of that decision would itself violate the Convention. In light of that decision, Amicus will address the following questions:

1. Must United States courts treat the International Court of Justice's interpretations of the Vienna Convention as authoritative and not just persuasive?

2. Should a federal court apply the procedural default doctrine based on the violation of a state procedural rule to bar Petitioner's Vienna Convention claim, thereby disregarding the International Court of Justice's *Avena* Judgment?

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INTEREST OF AMICUS CURIAE[1]

Pursuant to this Court's Rule 37.3, amicus curiae American Bar Association ("ABA" or "Amicus") respectfully submits this brief in support of the position that United States courts should give effect to the International Court of Justice's *Avena* Judgment and review Petitioner's conviction and sentence, rather than foreclose review based upon Petitioner's failure to comply with a state-created procedural rule.

STATEMENT OF INTEREST

The ABA is the world's largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 405,000 attorneys spans all 50 states and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.[2]

Among the ABA's goals are "promot[ing] meaningful access to legal representation and the American system of

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1. Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of the Court.

2. Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions of this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

justice for all persons regardless of their economic or social condition" and "advanc[ing] the rule of law in the world."

The ABA has long recognized the importance of promoting and adhering to mechanisms for the peaceful resolution of international disputes. In 1947, the ABA House of Delegates adopted a policy recommending that the United States "in order to further the administration of international justice ... refer[] all international questions or disputes susceptible of being decided on the basis of law, which cannot be settled by direct negotiations, to the International Court of Justice or to arbitral tribunals." 72 REPORTS OF THE AMERICAN BAR ASSOCIATION 102-03 (1947). In the same year, the ABA House of Delegates adopted a resolution expressing the ABA's "great satisfaction" that the United States had accepted the jurisdiction of the International Court of Justice "as binding upon it." *Id.* at 377.

The ABA House of Delegates reaffirmed its support for resolving international disputes in the International Court of Justice when it adopted a policy in 1994 recommending that the United States Government present a declaration recognizing that the International Court of Justice has "compulsory" jurisdiction in all legal disputes concerning "the interpretation of a treaty," "any question of international law," or "the nature or extent of the reparation to be made for the breach of an international obligation."

In 1998, the ABA House of Delegates adopted a resolution specifically recognizing the importance of complying with the Vienna Convention on Consular Relations and urging "federal, state, territorial and local law enforcement authorities to adopt a warning of rights similar to the '*Miranda*' standard, advising foreign nationals of their right to consular assistance pursuant to Article 36 of the Vienna Convention."

While the ABA takes no position on the death penalty as a general matter, it is especially concerned about the effective representation of criminal defendants who have been or might be sentenced to death.[3] The ABA has adopted numerous policies concerning the administration of justice and the effective representation of criminal defendants. For example, in 1990, the ABA House of Delegates adopted a resolution that in death penalty cases

> [f]ederal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim if the prisoner shows that the failure to raise the claim in a state court was due to the ignorance or neglect of the prisoner or counsel or if the failure to consider such a claim would result in a miscarriage of justice.

One of the several ABA entities that focus on legal issues related to capital punishment is the ABA Death Penalty Representation Project, which recruits, trains, and supports volunteer counsel to represent death row inmates who lack lawyers.

In 1989, the ABA House of Delegates adopted Resolution 122, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* ("*ABA Death Penalty Guidelines*"), which were designed to "amplify previously

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3. *See, e.g.*, *ABA Standards for Criminal Justice: Providing Defense Services* ("*ABA Providing Defense Services Standards*"), Standard 5-1.2 cmt. at 11 (3d ed. 1992) ("American Bar Association resolutions have frequently and consistently taken positions supporting the provision of quality representation by counsel in capital cases."); ABA House of Delegates Resolution 107, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003); American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 13 (1990).

adopted Association positions on effective assistance of counsel in capital cases [and to] enumerate the minimal resources and practices necessary to provide effective assistance of counsel."[4] The Guidelines were based on the experiences of those who handled post-conviction cases on collateral review and the lessons learned from the pattern of inadequate, unprepared, and under-financed counsel who represented at trial those accused of capital crimes. The ABA called upon each death penalty jurisdiction to adopt the *ABA Death Penalty Guidelines.*

Indeed, consistent with both its position with respect to the Vienna Convention and the United States' international obligations, as well as its concern with promoting meaningful access to the justice system, the ABA has adopted guidelines for attorneys representing foreign nationals. *See* Guideline 10.6 – Additional Obligations of Counsel Representing a Foreign National, adopted by the House of Delegates in February 2003. The guidelines instruct that at every stage of a case, counsel "should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals." Unless predecessor counsel has already done so, an attorney representing a foreign national is instructed to "immediately advise the client of his or her right to communicate with the relevant consular office," to "obtain the consent of the client to contact the consular office," and then to immediately contact the consular office to inform it of the client's detention or arrest.

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4. *See also ABA Providing Defense Services Standards,* Standard 5-1.2 cmt. at 12 ("These guidelines are incorporated by reference into the [*ABA Providing Defense Services Standards*]."); ABA Standards for Criminal Justice: Prosecution Function and Defense Function ("*ABA Prosecution Function and Defense Function Standards*"), Standard 4-1.2(c) (3d ed. 1993) ("Defense counsel should comply with the [*ABA Death Penalty Guidelines*].").

The ABA appears as *amicus curiae* because the questions presented in this case have serious implications for the stability of the rule of law throughout the world and for the availability of meaningful access to the American system of justice for foreign nationals prosecuted in American courts.

SUMMARY OF ARGUMENT

In 1963, at the height of the Cold War, the United States signed the Vienna Convention on Consular Relations. Apr. 24, 1963, 21 U.S.T. 77 ("Vienna Convention" or "Convention"). Article 36 of the Convention guarantees to all United States citizens abroad and to foreign nationals in this country that if they are arrested outside their home country: (1) law enforcement officials will tell them without delay that they may have their nation's consul informed of their arrest, and (2) if they consent to notification, the law enforcement entity will promptly advise consul of their arrest. The United States played a leading role in negotiating the wording of Article 36. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, reprinted in Sen. Exec. E, 91st Cong., 1st Sess., May 8, 1969, at 41, 59-61. To ensure the faithful and consistent application of these important protections, the United States also proposed and advocated for the dispute settlement provision that became the companion Optional Protocol. *Id.* at 72-73. The Optional Protocol provides for compulsory jurisdiction by the International Court of Justice ("ICJ") over all signatory nations to resolve any disputes concerning the interpretation of the Convention's provisions. *See* Optional Protocol, 21 U.S.T. 325, art. I.

Once the Vienna Convention and Optional Protocol were ratified by the Senate, they became binding on the United States as a whole and, under the Supremacy Clause, preemptive of any conflicting state laws. Nevertheless, when

Texas law enforcement authorities arrested Petitioner Jose Ernesto Medellin Rojas in connection with two murders, he was not advised of his right to contact the Mexican consul even though he informed the authorities that he was born in Mexico and that he was not a United States citizen. *See* Petition for Writ of Certiorari at 8, *Medellin v. Dretke* (No. 04-5928). Mr. Medellin was therefore unable to take advantage of the valuable assistance Mexican consular officers routinely give capital defendants. This assistance typically includes providing funding for experts and investigators, gathering mitigating evidence, contacting and translating for Spanish-speaking family members, and most importantly, ensuring that Mexican nationals are represented by competent and experienced defense counsel.[5]

Instead, Mr. Medellin was left with a court-appointed lead counsel who was suspended from the practice of law at the time of the investigation and trial and who performed extremely poorly. *Id.* at 9. In addition to failing to determine and assert the rights of his client under the Vienna Convention, Mr. Medellin's counsel failed to strike jurors who indicated that they would automatically impose the death penalty, and called no witnesses at the guilt phase of trial. *Id.* After Mr. Medellin was convicted of capital murder, the

5. *See, e.g.*, Michael Fleischman, Note, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 Ariz. J. Int'l & Comp. Law 359, 366-74 (2003) (describing the history and successes of Mexico's consular assistance program); Raymond Bonner, *U.S. Bid to Execute Mexican Draws Fire*, N.Y. Times, Oct. 30, 2000, at A20 (reporting that the legal attaché at the Mexican embassy said that in the two prior years he had persuaded prosecutors in four states not to seek the death penalty in murder cases and that, altogether, Mexican consular officials had intervened in an average of 3 death penalty cases per month between December 1994 and October 2000, with the ultimate result that in nearly half of those cases prosecutors did not proceed with a capital prosecution).

only expert witness the defense called during the penalty phase was a psychologist who had never met Mr. Medellin. *Id.* Mr. Medellin was subsequently sentenced to death. Mexican consular authorities only learned of Mr. Medellin's detention after the Texas Court of Criminal Appeals had affirmed his conviction and sentence. *Id.* at 10.

Mexico filed an application with the International Court of Justice on behalf of itself and 54 of its citizens, including Petitioner, to enforce the Vienna Convention against the United States. After receiving extensive written and oral submissions from Mexico and the United States, the ICJ ruled that Texas' failure to advise Petitioner of his right to consular services resulted in a violation of both Mexico's and Petitioner's rights under the Convention. *See Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31) ("*Avena*") ¶¶ 106, 153(4)-(7). Although the ICJ denied Mexico's request for annulment of the convictions and sentences, *id.* ¶ 123, the Court held that United States courts must provide review and reconsideration of the convictions and sentences tainted by the violations it had found. *Id.* ¶¶ 121, 128-34. The ICJ also specifically held that applying procedural default doctrines to bar consideration of the Mexican nationals' Vienna Convention claims would itself violate the Vienna Convention. *Id.* ¶¶ 112-13.[6]

6. The *Avena* Judgment built on and strengthened the ICJ's earlier judgment in the *LaGrand Case*, a case brought by Germany against the United States also alleging violations of the Vienna Convention. (Germany v. U.S.), 2001 I.C.J. 104 (June 27) ("*LaGrand*"). Unlike in *Avena*, by the time the ICJ ruled in *LaGrand*, both of the German nationals in question had been executed. The ICJ held in *LaGrand* that: (1) Article 36 of the Vienna Convention provides "individual rights" to foreign nationals; (2) applying procedural default rules to prevent detained individuals from challenging their convictions and sentences on the ground that their

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In the proceedings below, however, the United States Court of Appeals for the Fifth Circuit held that judicially created procedural default rules barred federal courts from reviewing Petitioner's conviction or sentence. 371 F.3d 279-80 (5th Cir. 2004). Because this case goes to the very core of the United States' commitment to honor the rule of law adopted when the United States signed and ratified the Vienna Convention and its Optional Protocol, and because the Fifth Circuit's decision would effectively deny foreign nationals and their nation-states meaningful federal review of their treaty rights, its decision should be reversed.

The federal policies underlying the court-made procedural default rules are not advanced by applying those rules to claims arising under the Vienna Convention. In the traditional habeas corpus case, the procedural default doctrine serves to ensure respect for state court procedural rules. In contrast, cases involving Vienna Convention claims implicate the federal government's plenary and paramount interest in the conduct of foreign relations. The risk to international relations is particularly acute where, as here, an individual state's procedural rule may be used to evade a binding and authoritative decision of the ICJ that favors one of the United States' treaty partners. Moreover, unlike the ordinary case in which procedural default rules are designed to prevent gamesmanship by counsel, defendants and their attorneys are generally unaware of the existence of Vienna Convention rights. Failure to raise them because of sheer

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rights under Article 36 of the Vienna Convention had been violated itself violated the Vienna Convention; and (3) if the United States failed to comply with Article 36 in future cases involving German nationals subjected to severe penalties, it must "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention." *LaGrand* ¶¶ 77, 90-91, 125.

ignorance cannot be the result of a strategic choice. Such a rule also would not unduly interfere with the efficient administration of federal courts.

This Court's per curiam opinion in *Breard v. Greene*, 523 U.S. 371 (1998), does not require application of the procedural default doctrine in this case. *Breard*'s determination that the procedural default doctrine could bar that petitioner's Vienna Convention claim was based on assumptions about the Convention that the ICJ's authoritative interpretation in *Avena* has now shown to be incorrect and on a statutory provision that does not apply to this case. The policy implications of this case also differ from those of *Breard*.

Enforcement of the ICJ's *Avena* Judgment is critical to promoting the rule of law throughout the world and to protecting United States citizens' rights under the Convention. The manner in which foreign nationals are treated in domestic courts can have broad international and domestic consequences, and these matters are soundly committed by the Constitution to the judgment of the federal government. Moreover, in light of the ICJ's authoritative interpretation of the Vienna Convention, a decision of this Court that would prevent federal courts from giving effect to that decision would severely undermine international confidence in the United States' commitment to the Optional Protocol and would invite breaches by other treaty partners.

ARGUMENT

I. The federal policies underlying the court-made federal procedural default rules do not support denial of a federal forum for enforcement of international treaty obligations in light of the federal government's plenary power over foreign relations, and the minimal risk to state criminal processes.

The procedural default doctrine is a jurisprudential rule crafted by the federal courts to protect the integrity of state court proceedings.[7] It was fashioned to promote three principally domestic goals. First, the procedural default doctrine promotes federal-state comity by precluding federal courts from hearing federal habeas claims that were not previously raised in accordance with state procedural rules, absent a showing of cause and prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977); *Reed v. Ross*, 468 U.S. 1, 11 (1984) (explaining that considerations of comity and concerns for the orderly administration of criminal justice motivate the procedural default doctrine); *Coleman v. Thompson*, 501 U.S. 722, 730-32 (1991) (explaining that "concerns of comity and federalism" underlie procedural default rules). Second, the procedural default doctrine prevents gamesmanship or "sandbagging" by defendants and/or defense lawyers, who might otherwise "take their chances on a verdict of not guilty in a state trial court with the intent to raise their [federal] claims in a federal habeas court if their initial gamble does not pay off." *Sykes*, 433 U.S. at 89. Third, like other limits on the ability of federal courts to grant habeas relief, the

7. *See Dretke v. Haley*, 541 U.S. 386, __, 124 S. Ct. 1847, 1853 (2004) (referring to the exceptions to the procedural default doctrine as "judge-made rules"); Patrick E. Higginbotham, *Reflections on Reform of § 2254 Habeas Petitions*, 18 Hofstra L. Rev. 1005, 1014 (1990) ("[R]espect for state procedural default rules is a judge-made doctrine, not directly drawn from any express statutory provision.").

doctrine reduces the burdens habeas cases place on the federal courts. *See Murray v. Carrier*, 477 U.S. 478, 487-88 (1986) (refining the procedural default doctrine with the explicit goal of minimizing the burden on federal habeas courts); *cf. Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976) (explaining the decision to eliminate Fourth Amendment claims from the scope of federal habeas review by stating that "resort to habeas corpus ... results in serious intrusions on values important to our system of government" including "the most effective utilization of limited judicial resources"). Because these policies must give way to Congress' decision that U.S. courts must enforce Vienna Convention obligations as interpreted by the ICJ, and because the traditional policies supporting the procedural default doctrine are diminished when they implicate duties owed by the United States to foreign nations under the Convention, this Court should give effect to the ICJ's *Avena* Judgment, and enforce its interpretation of U.S. treaty obligations.

A. In cases implicating the United States' treaty obligations under the Vienna Convention, the balance of federal and state interests tips more heavily toward federal interests than when only internal state procedural rules and domestic law are at stake.

1. The power to conduct international affairs and the authority to enter treaties are granted exclusively to the federal government by the Constitution, and, under the Supremacy Clause, treaties plainly preempt contrary state laws.

In the arena of international relations, federal interests are at their height, and they are exclusive of state interests. *See, e.g., American Ins. Ass'n v. Garamendi*, 539 U.S. 396,

413 (2003) ("concern for uniformity in this country's dealings with foreign nations . . . animated the Constitution's allocation of the foreign relations power to the National Government") (internal quotation marks omitted). The Constitution entrusts the federal government with "full and exclusive responsibility for the conduct of affairs with foreign sovereignties." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). As this Court has emphasized, "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Id.*; *see also Board of Trustees of University of Illinois v. United States*, 289 U.S. 48, 59 (1933) ("In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."); The Federalist No. 80, at 500 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) ("[T]he peace of the *whole* ought not to be left at the disposal of a *part*"). Applying the procedural default doctrine to avoid enforcement of the United States' Vienna Convention obligations would allow state and local procedural rules to impair foreign relations.

It is precisely because of the importance of ensuring that the entire country speak with one voice in international relations and that the United States be able to fulfill its international obligations that the Constitution explicitly makes treaties "the supreme Law of the Land," overriding "any Thing in the Constitution or Laws of any State to the Contrary."[8] U.S. CONST. art. VI, cl. 2. "It is the declared duty"

8. The United States signed the Vienna Convention and its Optional Protocol on April 24, 1963, and the Senate unanimously ratified both instruments on October 22, 1969. *See* 115 CONG. REC. 30,997 (Oct. 22, 1969). Accordingly, the Vienna Convention indisputably has the force of a treaty under the Constitution.

of both state and federal judges, under the Supremacy Clause, "to determine any Constitution, or laws of any State, contrary to [a] treaty . . . made under the authority of the United States, null and void." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1796); *see also Hauenstein v. Lynham*, 100 U.S. 483, 489 (1880) ("It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State."). The transcripts of the Senate hearings on ratification of the Vienna Convention make clear that the Senate understood that the Convention would preempt any conflicting state laws. S. EXEC. REP. No. 91-9, 91st Cong., 1st Sess. 2 & 5 (appendix) at 18 (statement by Deputy Legal Adviser J. Edward Lyerly) (1969) ("[T]o the extent that there are conflicts in . . . state laws[,] the Vienna Convention, after ratification, would govern."); William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 267-68 (1998).

There is no doubt that Texas's procedural rules, if enforced through the application of the federal procedural default doctrine to Mr. Medellin's federal habeas petition, would conflict with the Vienna Convention. The United States agreed to be bound by the ICJ's interpretations of the Vienna Convention when it signed and ratified the Optional Protocol to the Convention. *See* Optional Protocol, art. I (providing that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice."). In its *Avena* Judgment, the ICJ held that application of the procedural default rules to preclude review of Vienna Convention violations prevents "'full effect [from being] given to the purposes for which the rights accorded under this article are intended,' and thus violate[s] paragraph 2 of Article 36." *Avena*, ¶ 113. The Vienna Convention, as

authoritatively interpreted, therefore prohibits state procedural rules from blocking review of Vienna Convention claims brought by foreign nationals such as Mr. Medellin. It would violate both the Supremacy Clause and the intent of the Senate that ratified the Vienna Convention and the Optional Protocol to allow state procedural rules to do so.

2. Unlike federal constitutional rights that may be procedurally defaulted, here the right belongs not only to the defendant but also to the defendant's home country, thereby affecting international relations and heightening the federal interests at stake.

When a state arrests or prosecutes a citizen of a country that is a signatory to the Vienna Convention and fails to comply with the Convention's requirements, that failure violates not only the defendant's rights, but also the rights of the defendant's home country. *See, e.g.*, *LaGrand Case* (Germany v. U.S.), 2001 I.C.J. 104 (June 27) ("*LaGrand*") ¶ 74 ("[W]hen the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay, . . . the sending State has been prevented for all practical purposes from exercising its rights under Article 36."); *Avena*, ¶ 102 (describing the United States as precluding Mexico "from exercising its right" under one provision of the Convention). Those rights include the rights "to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Vienna Convention, art. 36 ¶ 1(c).

When a state fails to honor a treaty-partner's Vienna Convention rights, the federal government must deal with the consequences. The resulting tensions in international

relations can be substantial. *See, e.g.*, Brian Knowlton, *Execution Pits Mexico Against U.S. – Fox Echoes World On Death Penalty*, INT'L HERALD TRIB., Aug. 16, 2002, at 1 (reporting that Mexican President Vicente Fox canceled a trip to visit President George W. Bush's Texas ranch to protest Texas's execution of a Mexican national who had not been told of his Vienna Convention rights). As this very case demonstrates, state officials' violations of the Vienna Convention may cause the United States to be brought before the ICJ and ultimately to receive a judgment against it. *See Avena*; *see also LaGrand.*

The impact on international relations distinguishes Vienna Convention rights from other federal rights that have been subjected to procedural default rules. Generally, if an American defendant violates a state procedural rule in attempting to assert an individual federal right, only that individual's rights are affected. In such situations, this Court has determined that federal-state comity generally requires that any claim to that right be considered procedurally defaulted. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977). The balance of federal and state interests tips much more heavily toward federal interests, however, when the right at issue belongs not just to the defendant, but also to his home country. It would violate the federal government's constitutionally protected interest in international relations to apply that doctrine to hold that the right of a sovereign treaty-partner – which was never informed of the arrest and detention of one of its citizens – may be waived by the procedural mistakes of an individual attorney.

B. Sandbagging is not a concern in this context because when a defendant fails to raise the claim that his Vienna Convention rights have been violated, it is usually due to ignorance, not strategy.

Article 36 of the Vienna Convention requires United States authorities to tell an arrested foreign national, "without delay," that he may have his nation's consul informed of the arrest. ¶ 1(b).[9] When such information is not provided, it is very likely that the arrested individual will be unaware of the right to consular notification. His lawyer is also highly likely to be unaware of that right because most lawyers have received no training in international law. *See* Claudio Grossman, *Building the World Community: Challenges to Legal Education and the WCL Experience*, 17 Am. U. INT'L L. REV. 815, 825 (2002) (reporting that "the contemporary law student is only slightly more likely to take an international law course than her counterpart in 1912" and that as of 2002, there were "still no questions on any bar exam concerning international law, no mandatory international law courses, and generally no first-year exposure to the study of international law."); John A. Barrett, Jr., *International Legal Education in U.S. Law Schools: Plenty of Offerings, But Too Few Students*, 31 INT'L LAW. 845, 854 (1997) ("[A]t most law schools across the United States, fewer than 20 percent of graduates ever take a course in international law."). Nor has the federal government created any mechanism for

9. The ICJ found that the detaining authorities' duty to provide information to an individual about consular rights "arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national." *Avena*, ¶ 63. The court suggested that because law enforcement authorities do not always know whether someone is a foreign national, every arrested individual could be told, along with the *Miranda* warnings, that "should he be a foreign national, he is entitled to ask for his consular post to be contacted." *Id.* ¶ 64.

notifying defendants and their lawyers of consular rights under the Vienna Convention. Simply put, defendants and their attorneys cannot make strategic decisions to leave out arguments about which they are utterly unaware. *Cf. Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (explaining that counsel's failure to file a timely suppression motion could not have been based on "strategic considerations" because counsel was unaware of the potential basis for the motion after failing to conduct any pretrial discovery).

The fact that there is no federally-imposed system in place for informing defendants or their attorneys of consular rights under the Vienna Convention further distinguishes those rights from the other federal rights that may be procedurally defaulted. For example, the right to receive *Miranda* warnings, which is subject to the procedural default doctrine,[10] also involves the defendant's right to be informed of other rights. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). But since this Court's decision in *Miranda*, the *Miranda* warnings have "become embedded in routine police practice to the point where [they] have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). No such national practice has developed to inform arrested individuals of their Vienna Convention rights. The federal government has made efforts to encourage state and local law enforcement officials to comply with the Vienna Convention, but has not completed the task.[11] The lack of a

10. *See Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991) (applying the procedural default doctrine to bar a *Miranda* claim on federal habeas).

11. In January, 1998, the State Department published a booklet entitled "Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding (Cont'd)

national practice compounds the problems associated with not informing an individual defendant directly of those rights, because the defendant is unlikely to have heard of the rights from others who have been arrested or from television or movies.[12]

(Cont'd)
Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them" and a reference card designed to be carried by individual arresting officers. *See LaGrand*, ¶ 121. By June, 2001, 60,000 copies of the booklet and 400,000 copies of the pocket card had been distributed to federal, state and local law enforcement and judicial officials. *Id.* The State Department has reported that by December, 2003, these members had grown to 100,000 and 600,000, respectively. *See* Adam Liptak, *Mexico Awaits Hague Ruling on Citizens on Death Row*, N.Y. TIMES, Jan. 16, 2004, at A1. The State Department does not deny, however, that Vienna Convention violations continue. *See id.* Apparently, the fact that the federal government has informed state authorities about the Vienna Convention does not mean that state authorities will pass that information on to defendants and their attorneys. Indeed, as this case demonstrates, unless federal courts enforce Vienna Convention rights on habeas, states will be able to violate the Vienna Convention with impunity.

12. It is clear that Mr. Medellin's failure to raise his Vienna Convention claim was not the result of a strategic decision. At the time of Mr. Medellin's trial in 1994, *Wainwright v. Sykes* had already been decided, and no federal court had held that an exception to the procedural default rules should be made for habeas claims under the Vienna Convention or any other treaty. Indeed, reflecting the state of the law prior to the ICJ's decision in *Avena*, this Court found in *Breard v. Greene* that Vienna Convention rights could be procedurally defaulted. 523 U.S. 371, 375-76 (1998). Given the state of the law at the time of Mr. Medellin's trial, he should have expected that if he failed to raise a claim regarding his Vienna Convention rights, he would waive the claim both for the purposes of his state court proceedings and for any future federal habeas proceedings. There is therefore no reason to believe that Mr. Medellin was engaging in gamesmanship or was making any other strategic choice when he failed to raise a claim regarding the violation of his Vienna Convention rights at trial.

C. Giving effect to the *Avena* decision would not create a significant burden for federal courts.

Giving effect to the *Avena* decision would not open the floodgates to habeas claimants. Going forward, if the federal courts enforced Vienna Convention rights on habeas more frequently, states would presumably implement procedures to honor those rights in the first place, thereby eliminating most future Vienna Convention habeas claims. State courts faced with Vienna Convention claims also would be less likely to treat those claims as procedurally barred. This would further reduce the need for federal courts to evaluate the claims in the first instance, without the benefit of state court consideration. *Cf. Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977) (explaining that if state appellate courts know that federal issues 'raised for the first time in the proceeding before them may well be decided in any event by a federal habeas tribunal[,]" they will have to choose "between addressing the issue notwithstanding the petitioner's failure to timely object, [and] fac[ing] the prospect that the federal habeas court will decide the question without the benefit of their views.") Thus, any impact on federal courts' workload created by giving effect to the *Avena* decision would diminish rapidly over time.

II. The reasoning in *Breard v. Greene* does not control the instant case in light of the subsequent authoritative interpretation of the Vienna Convention by the ICJ.

This Court's per curiam opinion in *Breard v. Greene*, 523 U.S. 371 (1998), does not control this case and is readily reconciled with Amicus' views. In *Breard*, Court gave two reasons why Petitioner Breard's Vienna Convention claim could be procedurally defaulted, neither of which applies here. First, the Court expressed the view that, at that time,

the procedural default doctrine did not appear to be inconsistent with the Vienna Convention. *Id.* The Court explained that it would have "give[n] respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such" if there were such an interpretation. *Id.* But "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Id.* The ICJ has now provided precisely such "a clear and express statement to the contrary." *See Avena*, ¶ 113. This subsequent authoritative interpretation of the Convention by the ICJ eliminates the primary rationale upon which the *Breard* decision was based.

Second, this Court observed in *Breard* that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was enacted long after the Vienna Convention became effective in the United States. This Court noted that if a statute enacted after a treaty is inconsistent with the treaty, "the statute to the extent of conflict renders the treaty null." *Breard*, 523 U.S. at 376 (internal quotation marks omitted). This Court then pointed to the provision of AEDPA providing that an evidentiary hearing is generally unavailable on federal habeas if the petitioner "has failed to develop the factual basis of [the] claim in State court proceedings." *Id.* (quoting 28 U.S.C. § 2254(e)(2)). Unlike the petitioner in *Breard*, however, Mr. Medellin raised his Vienna Convention claim in his state post-conviction proceedings. He also filed a supporting affidavit and requested an evidentiary hearing, which was denied.[13] *See* Petition for Writ of Certiorari at 21, *Medellin v. Dretke* (No. 04-5928). Thus, under *Michael*

13. The State concedes that Mr. Medellin was not notified of his right to contact the Mexican consul. *Medellin v. Dretke*, 371 F.3d 270, 279 (5th Cir. 2004). Indeed, the state habeas court commented on the merits of Mr. Medellin's Vienna Convention claim. *See* Brief in Opposition at 14, *Medellin v. Dretke* (No. 04-5928).

Williams v. Taylor, 529 U.S. 420 (2000), AEDPA's limitations on evidentiary hearings do not apply in this case.

In *Michael Williams*, this Court held that only habeas petitioners who have "failed to develop the factual basis of a claim," must comply with 28 U.S.C. § 2254(e)(2)'s requirements for an evidentiary hearing. 529 U.S. at 430. The Court further held that such a failure requires "a lack of diligence." *Id.* This Court emphasized that diligence "depends upon whether the prisoner made a reasonable attempt .. . [to] pursue claims in state court," *id.* at 435, and suggested that "seek[ing] an evidentiary hearing in state court in the manner prescribed by state law" would be sufficient "in the usual case." *Id.* at 437.[14] Because AEDPA's limitations on evidentiary hearings do not apply in this case, they cannot bar application of the Vienna Convention.

The fact that the ICJ has now issued the *Avena* Judgment also changes the policy considerations that necessarily bear on the question of whether some Vienna Convention claims should be exempt from the procedural default doctrine. The procedural default doctrine consists of judge-made rules designed to achieve certain goals, the foremost of which is the balancing of federal and state interests. The foreign relations stakes, and thus the federal interest in the relationship between the Vienna Convention and the procedural default doctrine, are dramatically higher now that the ICJ has issued the *Avena* Judgment than they were at the time *Breard* was considered. Ruling against Mr. Medellin would now require the Court to deny the enforceability of an ICJ order in favor of the very same individual. It would also require the Court to reject the ICJ's authoritative

14. *See also Mason v. Mitchell*, 320 F.3d 604, 621 n.6 (6th Cir. 2003) (finding that the petitioner's request for an evidentiary hearing in state court was sufficient to demonstrate diligence for purposes of avoiding application of 28 U.S.C. § 2254(e)(2)).

interpretation of the Vienna Convention, by which the United States government agreed to be bound. The implications of such a decision both for domestic separation of powers and for international relations are entirely different now than they were at the time *Breard* was before the Court.

III. To promote the international rule of law and to preserve the United States' ability to protect its citizens overseas, the United States courts should give effect to the *LaGrand* and *Avena* Judgments.

The treatment of foreign nationals by domestic law enforcement may have critical international and foreign policy implications. "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941). It is to prevent such real or imagined wrongs from leading to international conflict that the United States has entered treaties and agreed to participate in peaceful international dispute resolution mechanisms such as the ICJ. It would dangerously undermine these actions and the international rule of law for the United States to violate its obligations under the Vienna Convention and Optional Protocol by failing to give effect to the *LaGrand* and *Avena* Judgments.

A. If the United States does not respect foreign nationals' Vienna Convention rights, United States citizens abroad will likely not receive the Convention's protections.

As this Court has observed: "One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country."

Hines, 312 U.S. at 64. The Vienna Convention is designed to enable countries to help their own nationals when those nationals are abroad, in part by agreeing to allow other countries to take similar steps where their citizens are concerned. If the United States ignores its obligations under the Vienna Convention, it risks losing its ability to insist that other countries abide by their obligations to respect the consular rights of American citizens on their soil.

The United States has consistently used the Vienna Convention and the ICJ to protect its own citizens overseas. In fact, the United States was the first country to invoke the Optional Protocol, which it used to bring an application against Iran concerning U.S. diplomatic and consular personnel who were held hostage in 1979. *United States Diplomatic and Consular Staff in Teheran* (U.S. v. Iran), 1979 I.C.J. 7 (Dec. 15), 1980 I.C.J. 3 (May 24). In bringing that application, the United States relied on the Optional Protocol's establishment of the ICJ's compulsory jurisdiction over disputes arising out of the interpretation or application of the Vienna Convention. When the ICJ ruled in favor of the United States provisionally in 1979 and then finally in 1980, 1979 I.C.J. 7, 1980 I.C.J. 3, the United States insisted that Iran was bound to comply with the court's judgment.

The United States also routinely demands that it receive notice when its citizens are detained by foreign authorities. The State Department in fact requires consular officials to lodge a protest if detaining authorities do not notify the consul within 72 hours. 7 Foreign Affairs Manual § 426.2-1 (2004), available at http://foia.state.gov/masterdocs/07fam/07m0420.pdf. The United States cannot expect other countries to respect its citizens' consular rights, however, if the United States does not honor the reciprocal rights of those countries and their citizens in the face of state procedural impediments.

The fact that American courts' handling of Vienna Convention claims could affect the United States' ability to protect its citizens overseas is yet another factor distinguishing Vienna Convention rights from other rights subject to procedural default rules. If an American defendant is held to have procedurally defaulted a claim that his Sixth Amendment right to counsel was denied, only that defendant is affected. But if the United States violates foreign nationals' consular notification rights, and American courts compound that violation by refusing to hear the foreign national defendants' Vienna Convention claims, it could seriously prejudice how American citizens are treated when they are arrested overseas. This would be particularly true if the courts did so after the ICJ issued a binding decision to the contrary.

B. If United States courts now denied that they were bound by the ICJ's *Avena* Judgment, it would frustrate the United States' adoption of the Vienna Convention and Optional Protocol.

If United States courts were now to refuse to give effect to the ICJ's *Avena* decision, it would make the President's signing and the Senate's ratification of the Optional Protocol hollow. Article I of the Optional Protocol states that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol, art. I. Under the plain and unambiguous language of the Article, countries signing the Optional Protocol agree to submit to the jurisdiction of the ICJ in cases involving disputes over the interpretation or application of the Convention. Submitting to the ICJ's jurisdiction necessarily entails agreeing to be bound by its judgments. *See* United Nations Charter, art. 94 ("Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party"). A decision

by this Court refusing to give effect to the ICJ's *Avena* Judgment would entirely undermine the President's and Senate's actions signing and ratifying the Optional Protocol. It would infringe upon the treaty powers granted to the President and the Senate by the Constitution, and it would make the United States' treaty promises unreliable in the eyes of the rest of the world.

CONCLUSION

For the reasons set forth above, and consistent with its commitment to promoting the rule of law, the ABA respectively submits that the Court should reverse the decision of the Fifth Circuit.

Respectfully submitted,

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